IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 2196 OF 2003.
IN
SUIT NO. 1110 OF 2001

1. Mrs. Kailash Sharma & Ors.] .. Plaintiffs

Versus

1. M/s.Seagram Distilleries Ltd. & Ors.] .. Defendants

Mr.Rajiv Kumar with Mr.Darshan R. Mehta i/b M/s.Dhruve Liladhar & Co. for the plaintiffs.

Mr.D.J. Khambatta, Sr. Counsel with Mr.S.H. Doctor i/b J.Sagar Associates for the defendants.

CORAM: ANOOP V. MOHTA, J.

DATED: 14TH OCTOBER, 2005

P.C. :

1. This Notice of Motion has been taken out by the defendants in a suit dated 8th March, 2000 filed by the plaintiff, for a declaration and/or a cancellation of a Memorandum of Understanding (MOU)/Share Purchase Agreement (Agreement) between the parties and all consequential reliefs including, return and re-transfer of the shares, and accounts of the management and other usual interim reliefs.

2. In this Notice of Motion dated 23rd July, 2003, the main prayer is as under:

> "(a) that pending the hearing and final disposal of the suit this Hon'ble Court in exercise of its power under Section 24 of the Code of Civil Procedure, 1908 be pleased to withdraw Suit No.10 of 2000 and 14 of 2000 and Suit No.148 of 2001, pending before the Court of the Civil Judge, Senior Division, Nasik and transfer the same to itself to be heard alongwith the present suit;"

3. By an Affidavit in reply of plaintiff No.1, dated 6th December, 2004, all the plaintiffs have opposed the said transfer and/or withdrawal of the suits which have been pending for final hearing before the District Court at Nasik. The preliminary objection has been raised about the maintainability of the Notice of Motion in the suit filed in the Ordinary Original Civil Jurisdiction at Bombay.

4. The basic contention revolves around Rule 62 of the High Court of Judicature at Bombay, Original Side Rules, (for short "Original Side Rules"), which is reproduced as follows:

> "62. When an order is made by the High Court, Appellate Side, under the Extra-ordinary Civil Jurisdiction for the removal of a suit from any Subordinate Court, the Registrar, High Court, Appellate Side, shall transfer the papers

> in such suit, when received, to the Prothonotary and Senior Master, who shall treat the suit as a suit filed on the Original Side and shall enter in the General List of suits."

The other relevant Rule relied is of Chapter I Rule 5, of the Bombay High Court Appellate Side Rules (for short "Appellate Side Rules") which is reproduced as under:

> "5. All applications for transfer of suits, appeals, criminal cases or other proceedings pending for trial or disposal in any Civil Court or Criminal Court subordinate to the High Court or over which the High Court has the power of superintendence, to another Court subordinate to or under the superintendence of the High Court, or to the High Court may be disposed of by a single Judge."

5. The learned counsel, therefore, submitted that the Original Side Rules nowhere provide such provision, whereby, either of the parties can apply for a transfer of the suits pending before any other subordinate Courts, in the present case, the District Court at Nasik. The provision of Section 24, even if available, still in view of the Appellate Side Rules, as reproduced above, the parties have no choice, but to invoke the jurisdiction of the Appellate Side by filing an appropriate Miscellaneous Application and to get the order from the Single Judge for such transfer and/or

withdrawal of such suit, and not otherwise. In view of this, therefore, the present Notice of Motion having been filed on the Original Side jurisdiction in a pending suit therefore, is not maintainable and liable to be dismissed on this count itself, apart from the merits of the matter. The learned counsel has relied on **Sanganbhat V. Vasudev & Ors.** AIR 1976 Karnataka, 229 and **Kaikhusru Nanabhoy Bharucha & ors. Vs. Doss Maneckshaw Bharucha and ors.** 1983 (2) Bom.C.R., 277.

6. The learned counsel for the defendants, however, opposed the said preliminary objection and contended that the High Court on the Original Side has ample power and jurisdiction to transfer and/or to withdraw such suits pending in any subordinate courts. He has strongly relied on Clause 13 of the Letters Patent (Bombay) Act (for short "Letters Patent") read with Section 24 of the Code of Civil Procedure (for short "CPC"). He further contended that this Notice of Motion can be treated as an application under Clause 13, to transfer and/or withdraw the suits, as referred above, from the District Court at Nasik.

7. Clause 13 of the Letters Patent is reproduced as under, as has been relied upon by both the parties.

> "13. **Extraordinary Original Civil Jurisdiction -** And We do further ordain that the said High Court of Judicature at Bombay shall have power to remove and to try and determine, as a Court of extraordinary original jurisdiction, any suit being or falling within the jurisdiction of any Court, whether within or without the Presidency of Bombay, subject to its superintendence, when the said High Court shall think proper to do so, either on the agreement of the parties to that effect or for purposes of justice, the reason for so doing being recorded on the proceedings of said High Court."

8. The Letters Patent (Bombay) Act itself provides further power to make respective Rules of the Bombay High Court to exercise the Ordinary, Original, Civil jurisdiction and also for exercise of Appellate jurisdiction for civil, as well as, criminal matters. The power of the Single Judge and/or Division Court is also envisaged under the Act itself.

9. Noteably, a Division Bench of the Bombay High Court in **Salubai Vs. Chandu Sadhu** 1965, M.L.J., 203, while considering the constitutional validity of Rule 15A of the Bombay High Court Appellate Side Rules, of Chapter-XVI, after taking into consideration the Letters Patent (Bombay) Act (for short Letters Patent (Bom.) Act), Government of India Act 1915/85 and the Constitution of India Article 225, observed as under:

> "The Act of the Parliament 24 and 25 Victoria, Chapter 104, passed on August 6, 1861, provided by section 1 thereof for the establishment of the High Courts by grant of Letters Patent at Calcutta, Madras and Bombay. Under section 13 of the said Act, it was provided that the High Court established under the Act may by its own rules provide for the exercise, by one or more Judges, or by Division Courts constituted by two or more Judges of the said High Court, of the original and appellate jurisdiction vested in such Court, in such manner as may appear to such Court to be convenient for the due administration of justice."

Therefore, the Rules relating to the jurisdiction of the High Court on the Original Side and the Rules relating to the jurisdiction of the High Court on the Appellate Side are part and parcel of the High Court of Judicature at Bombay, as contemplated under the Letters Patent (Bombay) Act. As observed above, these Rules take into consideration the practice and procedure in reference to various matters, including Civil law, Criminal law, Admiralty & Vice-admiralty jurisdiction, Testamentary & Intestate jurisdiction etc. Both these Rules i.e. Original Side Rules and Appellate Side Rules take into consideration various procedural practice and aspects of various laws as referred above, apart from provisions of entertaining of such matters by a Single Judge or a Division Bench. It needs to be mentioned here that it deals with all related aspects of Suits, Notice of

Motion, Chamber Summons, Writ Petitions, Appeals, Revisions, Judgment, Decree and power and practice of Office of the Original Side.

10. The Original Side Rules and basically the extension of Ordinary Original Civil jurisdiction of the High Court to Greater Bombay is defined in the Greater Bombay laws and the Bombay High Court (declaration of limits) Act, 1945 [for short "Declaration of Limits Act"], as amended from time to time. By this Act, as per Section 2(2), "Greater Bombay" means the area as defined and specified in Schedule "A". As per Section 5 of the said Act, the High Court ordinarily shall have power to exercise the Original Civil jurisdiction within the areas comprised of the Greater Bombay only. For the purpose of the present issue, it is sufficient to mention that Nasik District is not within the area of the Greater Bombay. Therefore, the High Court on its Original Side has no *prima facie* jurisdiction to consider and/or try the matters arising out of the Greater Bombay. However, if case is made out, the High Court on its Original Side may entertain such suits and proceedings with the leave of the Court under Clauses 12 and 14 of the Letters Patent. Rule 26 of the Original Side further elaborates the Original jurisdiction of the High Court on its Original Side which may be heard

before one or more Judges of the High Court.

11. The High Court, therefore, as observed above, in **Salubai** (supra) made Rules for internal management including the procedure relating to the disposal of matters under its Civil jurisdiction, either by a Single Judge or a Division Bench. Those Rules need to be respected. There is no question of going beyond those Rules of practice and procedures. In the present case, the High Court, having adopted the procedure as contemplated under Rule 5 of Chapter I of the Appellate Side Rules, accordingly referred and dealt with the same in Rule 62 of the Original Side Rules. As there are no specific Rules made under the Original Side Rules for such transfer and/or withdrawal of the suits, the parties have no other option, but to follow the procedure as provided under Rule 5 Chapter I of the Appellate Side Rules. The provision of Section 24 of the CPC also cannot be overlooked at this stage, specially in absence of any specific Rules. The present Notice of Motion has been taken out by the defendants under Section 24 of the CPC, even though argument was advanced, based upon Clause 13 of the Letters Patent Act.

12. The Appellate Side Rules, as referred above,

deal with the power of the High Court to consider the matters in its Appellate Side jurisdiction. Its Rules are amended from time to time. In this matter, we are concerned with Rule 5.

13 The Apex Court's decision in **Abhay Singh Surana Vs. The Indian Rayon & Industries Ltd.** AIR 1988 SC, 1870, has been relied in reference to the power and jurisdiction of the Court under Letters Patent (Calcutta) Act, Clause 13. Clause 13 of the Letters Patent (Calcutta) Act of 1865, as contended, is *para materia* with Clause 13 of the Letters Patent as referred above. The Apex Court has taken note of Clause 13, but one facet which cannot be overlooked is that in that case, there was a consent to transfer the suits and based upon the said consent, the suit was transferred by making the above observations. There is no such consent in the present case. Therefore, elements of purpose of justice need to be looked into. The Apex Court has also observed, while interpreting Clause 13 of the Letters Patent as under:

> "The aforesaid clause has been subject-matter of various adjudications and interpretations by the High Court. It enables the High Court to exercise the extraordinary original civil jurisdiction. The Letters Patent contemplates two contingencies for the High Court to

> exercise extraordinary jurisdiction, namely, on agreement of the parties to that effect, the suits be transferred and secondly, for the purpose of justice. It further stipulates that the reason for so doing to be recorded on the proceedings in the High Court."

There is no such agreement between the parties in the present case. The " purpose of the justice" is the issue which needs to be considered in this case.

14. Strikingly, a Division Bench of the Bombay High Court, as relied by both the parties, in **Vaman Vasudev Chitaley Vs. Raghunath Ganesh Thakar** AIR 1949, Bom., 263, while considering Section 24 of CPC on a Civil Application filed by a party for transfer of a suit, finally transferred the suit pending on the Original Side of this Court to the Court of Civil Judge, Senior Division, Pune. The relevant observations are as follows:

> "There is abundant authority for the view that a Bench on the appellate side can transfer a suit pending on the original side of this Court to a Court in the mofussil. But the Court must be satisfied that such a transfer is necessary."

The conclusion, therefore, as declared by the Division Bench is that the Court has power to transfer a suit pending on the Original Side of this Court to the Lower

Court. The relevant observation, which cannot be overlooked at this stage and which goes in favour of the preliminary objection, is that a Bench on the Appellate Side can transfer a suit pending on the Original Side of this Court to a Court in the mofussil, but the Court must be satisfied that such a transfer is necessary.

15. A full bench of Bombay High Court in (Narayan Vithal Samant V. Jankibai Sitaram Samant) (majority view) (Vol XVII Bomaby Law Reporter 655), while considering on reference the power of Single Judge sitting in the exercise of original civil Jurisdiction of the High Court, to stay the hearing of a suit pending for trial in sub-ordinate Judges Court, in absence of authorised rule has observed as under;

"The intent and effect of these provisions seem to me to be that the jurisdiction concerned is conferred on the Court as a body; it is the Court which is to "have and exercise" the jurisdiction granted : but, inasmuch as it would not be "convenient for the due administration of justice" that the entire Court should have to sit for the valid determination of every suit and appeal and application, power is given to the Court to make Rules for the exercise of the Court's jurisdiction by one or more Judges within the limits and subject to the conditions prescribed by the Rules. The powers so delegated would thus fix the limit within which such Judge or Judges would be competent to exercise the Court's jurisdiction, and any order made by a Judge or a Judges in excess of this authority would be void as being beyond the jurisdiction which the Judge or Judges were legally authorised to exercise."

16. The full Bench negatived the question referred

by and also observed as under;

"Now the particular order with which we are here concerned is an order made by a single Judge, sitting in the exercise of the Court's Ordinary Original Civil Jurisdiction, for the stay of a suit pending in the Court of the Subordinate Judge of Ratnagiri. But, by Cls. II and 36 of the Letters Pantent and Rule 62 of the Original Side Rules of this Court, the local jurisdiction of the learned Judge was confined to the Town and Island of Bombay. It is clear, therefore, and it was scarcely contested in argument, that the order under discussion appertains to the Appellate Side of the Court."

17 Another Division Bench of the Bombay High Court in **Nagappa Channappa Tambrali Vs. Ramsingh Jessasing & Anr. 1946 (Indian Law Reports)** I.L.R. (Bom.Series) 325, observed as under:

> "Mr.Thakor has relied on a case, *Lachmandas Tulshiram v. The Buckingham and Carnatic Co. Ltd.* in which my learned brother and myself held that an Appellate Side Bench of this Court has power under S.24 of the Code to transfer a suit pending on the Original Side of the High Court for trial to a Court in the mofussil."

18 The Bombay High Court in **Kaishusru** (supra) (SB), on a misc transfer application on the Appellate Side of Bombay High Court, after considering Rule 62 of the Original Side Rules and Clauses 12 and 13 of the Letters Patent (Bombay) and Section 115 of the CPC, observed : "*I, therefore, hold that there does exist in*

this Court, jurisdiction to transfer to this Court, a suit under the Rent Act for being heard and tried by this Court."

19. Therefore, it is the Appellate Side of the Bombay High Court that has jurisdiction to withdraw or transfer such suits from one Court to another, including from the Original Side to the mofussil Court. There is no such procedure available under Original Side Rules. The Appellate Side Rule 5 now in existence, gives power to a Single Judge to transfer suits or proceedings on a miscellaneous application filed by the parties. The Bombay High Court Rules and the specific procedure for transfer or withdrawal cannot be overlooked.

20. In **Sanganbhat V. Vasudev & Ors.** AIR 1976 Karnataka, 229, the Karnataka High Court, while considering the provisions of the CPC in reference to the issue of transfer of Appeal pending in the subordinate court, after considering the judgment of the Division Bench of the Madras High Court in **Srirangam Municipality Vs. R.V. Palaniswami Pillai** AIR 1951, Madras, 807, observed as under:

> "It would therefore be certainly wrong to say that every application under section

24 when made to this Court should be made on the original side."

21. The above observations are quite important to consider the preliminary objection as raised by the plaintiffs in the present case also. There is no doubt that Section 24 of the CPC provides that the High Court in its extraordinary jurisdiction, can transfer the suit or such other proceedings at any stage on an application and/or suo motto, if case is made out. Therefore, in the present case, as there is no specific Rule available and/or provided under the Original Side Rules for transfer or withdrawal of any suit pending before the subordinate Court within the Original Side jurisdiction, in fact Rule 62 of the Appellate Side Rules need to be adopted for transfer or withdrawal of the suits from the subordinate Court. Rule 62 itself takes into consideration the High Court’s extraordinary civil jurisdiction for the removal of a suit from the subordinate Court and it further deals with the power of the Prothonotary & Senior Master to treat the suit as a suit filed on the Original Side when such order is made by the High Court on the Appellate Side. Rule 5 of the Appellate Side Rules, as referred above, specifically deals with the provisions for such application for transfer of suits pending in the subordinate Court with

the High Court’s power of superintendence.

22. As there is no much controversy about the power of the High Court to transfer or withdraw such suits or proceedings, it is only a question of procedure and practice as adopted and followed by the High Court. When the High Court has prescribed a particular procedure and practice, there is no reason to overlook the same. The Apex Court in **Pandurang Vs. State of Maharashtra** 1986, M.L.J., 994 while dealing with the High Court Rules requiring an Appeal against acquittal to be heard by Division Bench, at page 995 observed as follows: *"Even if the decision is right on merits, it is by a forum which is lacking in competence with regard to the subject matter. Even "right" decision "wrong" forum is no decision. It is non existent in the eye of law and hence a nullity. The judgment under Appeal, therefore, is no judgment in the eye of law."* The Apex Court observed that the assignment as prescribed and power and jurisdiction as provided under the Rules cannot be overlooked.

23. In the present case, as referred above, Rule 5 of the Appellate Side Rules provides such procedure for filing such transfer Petition under Section 24 of the CPC and it is prescribed that such application be heard

and disposed of by any Judge of this Court and in the present case, as per Rule 5 by a Single Judge. Therefore, there is no specific reason that the present Notice of Motion be entertained. The parties must take appropriate steps by filing appropriate application as per the practice and procedure prescribed under the Appellate Side Rules of the Bombay High Court.

24. In absence of any rule, in a given case, Clause 13 of the Letters Patent, Act, may be invoked to transfer and/or withdraw such suits from the subordinate court and the suits pending on the Original Side can also be heard and tried alongwith the same. In the present case since the procedure is already prescribed by the Appellate Side Rules and the same has been adopted by the Original Side Rule 62, there is no reason that such Notice of Motion be entertained by overlooking the existing practice and procedure of filing applications as referred above.

25. The decision, as cited by the counsel appearing for the defendant in **N.Ram Mohan** (supra), even though dealt with two cases of the Madras High Court, in no way assists the defendants to support their case of entertaining the Notice of Motion, as filed, specially in view of two Bombay High Court Division Bench

judgments as referred above, apart from High Court Rules, as mentioned above. In **N.Ram Mohan** (supra), there was no reference made to such High Court Original Side Rules, as well as, Appellate Side Rules. Therefore, that case is distinguishable on facts itself.

26. The point which goes to the root of the matter here is whether the present Notice of Motion is maintainable in view of the available procedure under the Appellate Side Rules, basically Rule 5, as referred above. Both the counsel have conceded that there is no such rule under the Original Side Rules whereby, such application for transfer to this Court of a suit pending in the District Court can be moved or invoked. The Appellate Side, however, provided the specific provision for filing such transfer Petition and/or application as per the practice and existing Rules available under law. As observed above, a Division bench in **Vaman Vasudeo** (supra) specifically observed and declared that the Division Bench of the Appellate Side can transfer a suit pending on the Original Side of this Court to a Court in the mofussil. That decision was also on an application filed for transfer of suit which was registered as a Civil Application No.324 of 1947 on the Appellate Side of the High Court. Another decision relied by the learned counsel appearing for the plaintiff is **Kaikhusru**

(supra). That was also a case of Miscellaneous Civil Application No.5 of 1983, filed on the Appellate Side on which the above referred declaration was made about existence of Court's power to transfer such suits. The issue, therefore, is settled to the extent that the Appellate Side has power to transfer the suits filed on the Original Side to the District Court and the High Court has also the power to transfer and withdraw the suits from mofussil court to the Original Side to be tried and heard.

27. There is no specific Rule for withdrawing and/or calling for the proceedings from the lower court in either of these Rules i.e. Appellate Side Rules, as well as, Original Side Rules. Rule 62 of the Original Side Rules, as referred above, by incorporation can be said to have adopted Rule 5 of the Appellate Side, as referred above, for such transfer or withdrawal of proceedings. The Registrar, Prothonotary and Senior Master of the Original Side thereafter, as referred above, treats the same as Original Side Suit and the respective court tries it as per list of suits.

28. In the present case, admittedly, through this Notice of Motion for the first time the defendants have invoked and prayed for transfer and/or withdrawal of

such suits which are pending in the District Court at Nasik. The parties are not remedy-less, even though there is no specific procedure available under the Original Side Rules. On the contrary, Rule 62, as referred above, also takes into consideration the power and procedure available on the Appellate Side in such circumstances and it provides specifically to deal with such transferred suits to be registered as Original Side Suit, if ordered accordingly.

29. Therefore, it is clear that this High Court has jurisdiction to transfer or withdraw the suits from the District Court to the Original Side to be tried and heard at Bombay, but the requirement, as referred above, is that parties must file Misc. Civil Application as provided under the Appellate Side Rules and invoke the jurisdiction of the Appellate Side of the Bombay High Court for appropriate order. The above referred decisions of the Bombay High Court have already declared

the practice and procedure of filing such applications for transfer or withdrawal of such suits.

30. There is one more aspect of the Original Side

Civil jurisdiction as raised by the learned counsel appearing for the plaintiffs based on the **Sanganbhat** (supra) case. The Original Side Rules envisages the jurisdiction of the Original Side of this Court in reference to the Greater Bombay area. The Original Side has restricted jurisdiction and control within its subordinate courts. The District Court, Nasik, cannot be said to be a subordinate court of the Original Side for the purpose and as contemplated under Section 24 of the CPC, as well as, Clause 13 of the Letters Patent. In view of the other reasoning given above, I am not going deep into this controversy in this case.

31. The High Court, as observed above, in view of Clause 13 of the Letters Patent and/or Section 24 of the CPC has the power to transfer such suits or proceedings, after considering the need, as well as, circumstances, apart from meeting the ends of justice, if case is made out by the parties but subject to and as per the prescribed rules and prescribed procedure. The power of transfer of such suits as elaborated and discussed in a host of cases and one of them, as relied by the learned counsel appearing for the plaintiff viz. **Abdul Rahman Vs. Prasony Bai & Anr.** (2003) 1, S.C.C., 488, need no further discussion and/or elaboration except the \ following quotation.

> 18. A bare perusal of the said provision leaves no manner of doubt that the High Court had the requisite jurisdiction to suo motto withdraw a suit to its file and adjudicate itself all or any of the issues involved therein."

32. The Apex Court in **Chitivalasa Jute Mills Vs. Jaypee Rewa Cement** (2004) 3 S.C.C., 85, in paragraph 12 at page 89 observed thus:

> "Unless specifically prohibited, the civil court has inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. Consolidation of suits is ordered for meeting the ends of justice as it saves the parties from multiplicity of proceedings, delay and expenses. Complete or even substantial and sufficient similarity of the issues arising for decision in two suits enables the two suits being consolidated for trial and decision. The parties are relieved of the need of adducing the same or similar documentary and oral evidence twice over in the two suits at two different trials. The evidence having been recorded, common arguments need to be addressed followed by one common judgment. However, as the suits are two, the court may, based on the common judgment, draw two different decrees or one common decree to be placed on the record of the two suits. This is how the trial court at Visakapatnam shall proceed consequent upon this order of transfer of suit from Rewa to the court at Visakhapatnam."

33. Therefore, if case is made out, the High Court can suo motto transfer or withdraw the particular suit

from particular Court and order the same to be tried in a particular Court or the High Court. The above observations of the Supreme Court need no further elaboration. What is important is to see the prescribed rules and facts and circumstances of each case to pass such order.

34. It is settled (Iridum India Telecom Ltd. V. Motorola Inc.) (2005 (3) Bom C.R. 781) that the suit on the original side of the High Court, Bombay shall governed by the High Court (Original Side) Rules. The provision which referred to a transfer and or a removal of suits, in the original side, is only rule 62. It also refers to the Appellate Side procedure to be followed by the Registrar of the Appellage Side and by the Prothonotary & Senior Master of the Original Side on such removed or transfered suit. Such transferred suit then be tried as per original side rule.

35 The appellate side of the Bombay High Court provides the specific rules dealing with the power of a single Judge sitting on Appellate Side to transferany suit, appeal, criminal proceding from sub-ordinate Court to the High Court. The Judge sitting on an original side, has no jurisdiction for want of specific rules to transfer and/or to remove the proceeding from any

sub-ordinate Court. There are no extraordinary and grave circumstances on the record to invoke suo motto power of the High Court in such dispute between the parties.

36. I am not dealing with the merits of the matter. Keeping all the points open for both the parties, the preliminary objection, as raised by the plaintiffs, in view of the above reasoning, is upheld. The parties are at liberty to file and/or to take appropriate steps to invoke the jurisdiction of the Appellate Side of the Bombay High Court by filing an appropriate Miscellaneous Application.

. This Notice of Motion is, therefore, disposed of with liberty.

[ANOOP V. MOHTA, J.]

[srpasha@hc]